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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JONNET DEVELOPMENT CORPORATION,
Petitioner,
v.
RICHARD S. CALIGUIRI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in an antitrust action, the court of appeals denied petitioner's right to a jury trial by affirming the decision of the district court to try in a non-jury proceeding legal issues and issues common to both legal and equitable claims and defenses presented.

2. Whether the decision of the court of appeals in denying petitioner's right to a jury trial of legal issues and issues common to both legal and equitable claims and defenses departed so substantially from the rulings of other circuits that direction from this court is essential to assure uniform interpretation and administration of the Seventh Amendment.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jonnet Development Corporation petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit entered February 16, 1382.[1]

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[1] Respondent Caliguiri is the Mayor of Pittsburgh, Pennsylvania. The other respondents are the members of the Mayor's Development Council—David Matter, Paul Brophy, George Carlton, Ed DeLuca, Louis Gaetano, Steve George, Ted Hardy, Ben Hayllal, Robert Lurcott, Hiram Milton, John Robin; the City of Pittsburgh; the Urban Redevelopment Authority of Pittsburgh; Consolidated Rail Corporation; Edward G. Jordan (Chairman of the Board of Conrail); and competing developers of certain hotel and business properties in downtown Pittsburgh—Grant-Liberty Development Group, a/k/a Hilton International, Vista International, the Buncher

OPINIONS BELOW

The district court's findings of fact and conclusions of law and the order of the court of appeals, are reprinted in the Appendix, pp. 1a-20a, 21a-22a. Neither the district court nor the court of appeals issued opinions in the instant case.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1982. App. p. 22a. A timely petition for rehearing was denied on March 15, 1982. App. p. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The following Federal Rules of Civil Procedure provide:

1.) Rule 38(a):

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Company, Jack G. Buncher, Mondev-Buncher Station Association, and Mondev International of Montreal.

Pursuant to Supreme Court Rule 28.1, Petitioner advises the Court that it is a wholly-owned subsidiary of Jonnel Enterprises, Inc., and an affiliate of American Sports, Inc., both closely held Pennsylvania corporations.

2.) Rule 42:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

3.) Rule 65(a):

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

STATEMENT OF THE CASE

A. Nature Of The Case

This is an action for treble damages under the Sherman and Clayton Antitrust Acts. Petitioner is a real estate developer and operator located in Monroeville, Pennsylvania. Petitioner and respondent Conrail signed a contract for the sale of Pennsylvania Station ("Penn Station") in the City of Pittsburgh. Whether this contract was subject to approval by the board of directors of Conrail and whether it was altered prior to this lawsuit are key factual issues in this case which petitioner contends should be determined by a jury.

Petitioner intended to develop the property as a hotel complex. Petitioner alleged that thereafter respondent city officials intervened and conspired with Conrail to block consumation of the sale and insure award of the contract to a combination of competing developers. The latter pledged to construct an office building which would not compete with a hotel planned by the city in the downtown Pittsburgh redevelopment area.

B. The Pleadings

On March 18, 1981, petitioner filed a complaint in the United States District Court for the Western District of Pennsylvania against the City of Pittsburgh, the Mayor of Pittsburgh, the members of the Mayor's Development Council, the Urban Redevelopment Authority of Pittsburgh (URA), the Consolidated Rail Corporation (Conrail), the former Chairman of the Board of Conrail, and certain competing developers of hotel and business properties in Pittsburgh. The complaint alleged violations of sections of the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2, 4, 15, 22 and 26.[2] The claim centered on the anti-competitive acts of Conrail and others in refus-

[2] Jurisdiction of the district court was invoked under 28 U.S.C. § 1337.

ing to complete the sale, or preventing the sale of Penn Station to petitioner.

The complaint alleged that petitioner, in response to a public solicitation of bids for the Penn Station property, submitted the highest bid for the property and that it then executed an Agreement of Sale with agents of Conrail.[6] Subsequent to the execution of the Agreement of Sale and upon discovering that petitioner intended to develop the property into a hotel facility, a representative of the Mayor and the City of Pittsburgh, contacted Conrail and ultimately caused Conrail to refuse to approve the Agreement of Sale or to transfer Penn Station to petitioner. Conrail instead sold the station to the URA, a party that had not participated in the bidding process, for purposes of resale to competing office building developers.

Petitioner alleged that many of the respondents had vested interests in a proposed hotel complex in the Convention Center facility in downtown Pittsburgh and acted in concert to prevent the sale of Penn Station to petitioner, thereby restricting the availability of hotel rooms in Pittsburgh in restraint of trade in interstate commerce and in violation of the Sherman and Clayton Acts. Petitioner also alleged that respondents monopolized and attempted to monopolize interstate trade and commerce in the availability of hotel accommodations.

Petitioner sought treble damages pursuant to 5 U.S.C. § 15 and requested equitable relief in the form of an order voiding the agreement of sale between Conrail and

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[6] The complaint alleged that "the terms of [the Agreement of Sale] are disputed [in a case pending before] the Court of Common Pleas of Allegheny County, Pennsylvania . . ."

Pursuant to the agreement, Conrail delivered the keys of the premises to petitioner and permitted petitioner to enter Penn Station to perform work necessary to prepare the station for renovation and prevent deterioration of the structure. Petitioner alleged it performed such work at substantial expense.

the URA and enjoining the sale transaction. Petitioner also moved for a preliminary injunction to enjoin Conrail from transferring title of Penn Station to the URA.

Although the existence of a final and binding agreement of sale was not essential to petitioner's antitrust claim, the pleadings reflect sharp disagreement as to the final form of the alleged agreement reached by the parties. Respondents Conrail and Edward G. Jordan filed an answer to the complaint in which they asserted as a defense that petitioner's claims were "based on a forged document constituting a fraud upon the court." The basis of the claims of fraud and forgery was that the contract had been altered. Conrail and Jordan also counterclaimed alleging that petitioner's filing of the complaint, knowing that it was based on a forged document, constituted malicious abuse of process. Respondents requested compensatory and punitive damages (but not equitable relief) in their counterclaim.

C. The Order For A Non-Jury Determination Of Issues

On May 11, 1981, certain respondents filed a motion pursuant to Fed. R. Civ. P. 65(a)(2) to advance and to consolidate trial on the merits with a hearing on the motion for preliminary injunction, on the grounds, *inter alia*, that "all of the evidence to be offered at such hearing is relevant to the trial on the merits" and that "consolidation is necessary to avoid repetition of evidence at the trial." In its answer to respondents' motion, petitioner tendered a limited and conditional consent to the consolidation in which it expressly reserved the right to a jury trial on the antitrust issues. This reservation was made by a clear and express proviso—

> that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant docu-

ments and prepare for such a preliminary injunction hearing; it being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.

After a status conference on May 22, 1981, the district court ordered consolidation of the hearing on all preliminary and permanent equitable relief as requested by respondents and also established a discovery schedule. When it later became evident that the parties could not complete discovery, the court modified the nature of the hearing, four days before the scheduled trial, and ordered that it would conduct on June 8, 1981, a non-jury hearing solely on the issue of the alleged fraud of petitioner.

D. Petitioner's Assertion Of Its Right To A Jury Trial

Petitioner demanded a jury trial in its complaint pursuant to Rule 38 of the Federal Rules of Civil Procedure. As indicated above, the demand was restated by the petitioner in its answer to respondents' motion for consolidation. Prior to commencement of the June 8 hearing, petitioner moved orally and in writing to impanel a jury for the determination of the issues to be addressed in the hearing on the ground that the hearing would encompass issues of fact common to both the equitable and legal claims and defenses presented and that this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), required that a jury be impanelled to determine the common issues.

The district court denied petitioner's request to impanel a jury. In so ruling, the court based its decision on its belief that determination of the issue concerning whether and by whom the Agreement of Sale was altered would "not be dispositive . . . . of [petitioner's] claim for money damages." The Court went on to state:

> Moreover, the affirmative defense raised by Conrail in your claim for money damages will also be addressed by a jury, and that right is guaranteed your client under the constitution.
>
> We are here today only to address the question as it applies to equitable consideration, whether or not due to unclean hands on behalf of your client, due to alleged fraud, the equitable relief in the nature of a preliminary and permanent injunction should be denied.

Accordingly, the court denied petitioner's motion to impanel a jury as well as its motions to certify the issue under 28 U.S.C. § 1292(b) as a controlling question of law, or, in the alternative, to stay the proceedings for two days in order that counsel have the opportunity to proceed with the matter before the United States Court of Appeals for the Third Circuit.[4]

Petitioner thereupon, in an attempt to preserve its jury trial right, moved to withdraw, with prejudice, all of its equitable claims for relief. Respondents would consent to such withdrawal only if petitioner also agreed to withdraw its claims for relief asserted in certain suits instituted in state court, a condition petitioner would not accept. Petitioner reiterated to the court its purpose in withdrawing all equitable claims for relief:

> [M]y client continues to maintain that it has a right to jury trial on all of the issues which the defendant wants to present today, and to the extent that there is no claim for equitable relief, then a jury trial must attach.

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[4] On the following day, petitioner, in a further attempt to preserve its right to a jury determination, filed a petition for a writ of mandamus with the United States Court of Appeals for the Third Circuit (C.A. No. 81-1943) seeking an order to compel the district court to impanel a jury. This writ was denied on grounds not specified by the court.

The court, however, once again denied petitioner's request stating "you have no right to a jury trial on the issues before me."

After an offer of proof by respondents, the hearing proceeded over the course of four days.[5] At the conclusion of the hearing, the court made, *inter alia*, the following findings:

1. That Petitioner submitted a conditional bid in the sum of $2.5 million for the property;
2. That neither Conrail's senior management nor its board of directors approved petitioner's offer to purchase Penn Station;
3. That Conrail was never "legally" bound to convey to petitioner title to the Penn Station property;
4. That petitioner had no "legal right" to receive title to the property; and
5. That the Agreement of Sale was "a fraud" and that the "fraud was intentionally perpetrated by plaintiff and its president, Elmer Jonnet, who signed all documents including [the Agreement]."

Accordingly, the court entered judgment denying equitable relief as sought by petitioner in its complaint and its motion for a preliminary injunction.

E. Proceedings Before The Court Of Appeals

A timely appeal was filed with the United States Court of Appeals for the Third Circuit (C.A. No. 81-2182). Petitioner asserted therein that it was denied its right to

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[5] Petitioner's counsel chose to stand on its claim to a right to jury trial and elected not to present testimony on the facts by its president (its representative in contract negotiations with Conrail), nor did it present expert testimony regarding the authenticity of the contract. Consequently, the findings of fact made by the trial court were made without full presentation of the evidence by Petitioner.

a jury trial on issues common to the legal and equitable claims of its antitrust suit and respondents' claim of malicious abuse of process. On February 16, 1982, the Third Circuit affirmed the judgment of the district court without opinion. A timely petition for rehearing was denied on March 15, 1982.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS EMASCULATES THE JURY TRIAL PROVISION OF THE SEVENTH AMENDMENT.

A. Decisions Of This Court Mandate That When Issues Of Fact Are Common To Both Legal And Equitable Claims, A Jury Determination Of The Legal Issues Must Precede A Non-Jury Determination Of The Equitable Issues In Order To Preserve The Constitutional Right To Trial By Jury.

The Seventh Amendment to the Constitution guarantees the right to a trial by jury in suits at common law. So firm a place in our history and jurisprudence does the maintenance of the jury as a fact finding body occupy, that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Moreover, Rule 38(a) of the Federal Rules of Civil Procedure reaffirms, in specific terms, the importance of this constitutional principle:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate.

In a long line of cases beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and continuing with *Dairy Queen, Inc. v. Wood*, 362 U.S. 469 (1962), and *Ross v. Bernhard*, 396 U.S. 531 (1970), this Court has established that where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by try-

ing the legal issues as "incidental" (*Ross v. Bernhard, supra*, at 538; *Dairy Queen, Inc. v. Wood, supra*, at 473), to the equitable issues or by a court trial of a common issue existing between the claims. Thus, where there are factual issues common to both the legal and equitable claims, "the legal claims involved in the action must be determined *prior* to any final court determination of [the] equitable claims." *Dairy Queen, Inc. v. Wood, supra*, at 479 (emphasis supplied). This principle was not followed by the district court in the instant case, which instead chose to try, without a jury, issues common to the legal and equitable claims.

The underlying concern in these cases is the *res judicata* or collateral estoppel effect of a prior determination of facts involved in an equitable claim upon issues common to the legal claim. *Heyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972). Indeed, this effect is already present in the instant case as evidenced by respondents' assertion in a motion for summary judgment in a related state court suit that petitioner is estopped from litigating the issue of whether a binding agreement of sale existed between it and Conrail and whether petitioner had committed fraud.[8]

In *Beacon Theatres, Inc. v. Westover, supra*, this Court dealt with a factual situation similar to the instant case. In that action, Fox West Coast Theatres, Inc. ("Fox") brought an action for injunctive and declaratory relief against Beacon Theatres, Inc. ("Beacon"). Fox alleged that Beacon had threatened to file antitrust actions against it, causing "duress and coercion," and thus depriving Fox of a valuable property right. 359 U.S. at 502. Fox prayed for a declaratory

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[8] *See Clausell, et al. v. Urban Redevelopment Authority of Pittsburgh*, Court of Common Pleas of Allegheny County, Pennsylvania, Nos. GD81-12256, 18390 and 18391 and Nos. GD80-27588 and 27590. This motion is reproduced in the Supplemental Appendix filed with the court of appeals.

judgment finding its actions lawful and not in violation of antitrust laws and further requested a temporary injunction preventing Beacon from instituting antitrust actions against it. 359 U.S. at 502.

Beacon answered with a denial and a counterclaim alleging that Fox had violated antitrust laws. Beacon requested treble damages and made a timely motion for a jury trial on all issues. 359 U.S. at 503. The trial court granted Fox's motion to strike Beacon's demand for a jury trial and ordered that the issues presented in Fox's complaint be tried to the court without a jury in advance of and separately from Beacon's counterclaim and cross-claim for damages under the antitrust laws.

Beacon sought a writ of mandamus from the Ninth Circuit which was denied. On review by certiorari, this Court reversed the decision of the court of appeals. It found that certain issues in the equitable claim were common to issues in the legal antitrust claim. Accordingly, by trying the equitable claims first, the district court might have limited Beacon's ability to try fully to a jury "every issue" bearing upon its treble damage suit. 359 U.S. at 504. This Court found that the district court should have tried the legal claim first, before a jury, prior to consideration of Fox's equitable claim for relief. In failing to do so, the district court compelled Beacon "to split up his antitrust case, trying part to a judge and part to a jury." 359 U.S. at 508 (footnote omitted).

The Court in *Beacon* concluded its opinion by stressing the high threshhold to be overcome before a jury trial of legal issues may be lost through prior determination of equitable claims, 359 U.S. at 510-11 (citation omitted):

> [T]he trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that dis-

> cretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott* v. *Neely*, 140 U.S. 106, 109, 110: "In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency." This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

In this case, the district court had ample opportunity to preserve petitioner's constitutional rights and also dispose of the equitable issues raised. The district court could have granted petitioner's motion to withdraw all equitable claims for relief; or tried the legal claims first and deferred consideration of the equitable claims; or impanelled a jury to decide the question of fraud; or determined the issue of entitlement to a preliminary injunction on grounds not dispositive of ultimate issues of fact relating to the legal claims. The court took none of these steps to protect petitioner's rights, electing instead to try dispositive issues without a jury.

In *Ross v. Bernhard*, *supra*, and in *Dairy Queen v. Wood*, *supra*, this Court reaffirmed that where there are common factual issues in legal and equitable claims made in an action brought in federal court, the legal claims involved in the action must be determined *prior* to any final determination of the equitable claims. Quoting with approval the Fifth Circuit decision in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961), this Court stated that "as long as any legal cause is involved, the jury rights it creates control." *Dairy Queen, Inc. v. Wood*, 369 U.S. at 473 n.8. Thus, the right to a jury trial in federal court is not lost as to

legal issues merely because those issues may be "incidental" to equitable issues. *Id.* Clearly in this case the issues in question were either legal in nature or common to the legal claims asserted.

Throughout this line of cases runs the basic principle of our Constitution and the common law, which this Court stated in *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (citation omitted):

> The right of trial by jury is of ancient origin, characterized by Blackstone as the "glory of the English law" and "the most transcendent privilege which any subject can enjoy" (Bk. 3, p. 379); and, as Justice Story said (2 Story on the Constitution, § 1779), ". . . the Constitution would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms". . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should be scrutinized with the utmost care.

The curtailment of petitioner's jury trial right by the district court and the court of appeals is directly contrary to the decisions of this Court. The deprivation here of petitioner's constitutional right is more obvious, since the trial court had a clear opportunity to dispose of the equitable issues without infringing upon the jury trial right.

B. There Was No Waiver Of The Right To A Jury Trial

In the court below, the respondents contended that the petitioner had waived its right to a jury trial because petitioner's counsel gave his consent to the respondents' motion to consolidate trial on the merits with a hearing on the motion for preliminary injunction, despite the fact that that consent was specifically conditioned on the preservation of the right to a jury trial. The district court did not base its decision on consent.

Moreover, Rule 39(a) of the Federal Rules of Civil Procedure provides that once a timely demand for jury trial is made, it may only be withdrawn when the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury.

Neither the petitioner nor its counsel executed a written or an oral stipulation to withdraw its demand for a jury trial. As shown above (pp. 6-7), the agreement to consolidate the trial on the merits with the hearing on the motion for preliminary injunction was expressly subject to the condition—

> that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with plaintiff reserving the right to proceed to jury trial on the ultimate issue of antitrust law violations and damages.

(C.A.App. at 56.)[7]

This is an express reservation of the right to jury trial, and cannot be construed as a waiver of that right either by its own terms, or as a written or oral stipulation under Rule 39(a) of the Federal Rules of Civil Procedure. If the court below decided to the contrary (it is impossible to tell the basis of its decision, since it gave no opinion), its decision is in conflict with the decisions in *Bowles v. Bennett*, 629 F.2d 1092 (5th Cir. 1980) and *Hyman v. Kline*, 456 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972). In both of those cases, the courts held that an agreement to consolidate does not, in itself, constitute "waiver" of the jury trial right, or withdrawal of the jury trial demand.

This Court has held that the right to a jury trial is so fundamental that courts must indulge "every reasonable presumption against waiver." *Aetna Insurance Co.*

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[7] The term "C.A. App." refers to the Joint Appendix filed with the court of appeals in the instant case.

v. Kennedy, 301 U.S. 389, 393 (1937). In the present case, the district court in denying petitioner's motion to impanel a jury did not base its decision on a waiver theory. A review of the record leads to the conclusion that the petitioner's trial counsel scrupulously refrained from any waiver and made every effort to guard the petitioner's right to a jury trial. To say that there was a waiver here is, to say the least, disingenuous. It erects a trap where petitioner's counsel took every possible step to make it clear that his first and basic objective was to protect his client's right to jury trial.

C. The Issues Adjudicated By The Trial Court Were Legal In Nature Or Were Common To Both The Legal And Equitable Claims And Defenses Presented.

Ross v. Bernhard, *supra*, teaches that the question of whether a litigant has a right to a jury trial depends on the nature of the issues to be tried rather than the character of the overall action. The "legal" nature of an issue is determined by considering: (1) the custom with reference to such questions before the merger of law and equity; (2) the remedy sought, and (3) the practical abilities and limitations of juries. *Id.*, 396 U.S. at 538 n.10.

Petitioner's complaint in this action alleged that appellees had combined to restrain trade in interstate commerce in violation of the Sherman and Clayton Antitrust Acts. (C.A.App. 10.) Antitrust actions requesting treble damages have uniformally been considered matters at law affording either party the constitutional right to a jury determination of those issues. *Curtis v. Loether*, 415 U.S. 189, 195-196 (1974); *Ross v. Bernhard*, *supra*, at 536; *Beacon Theatres, Inc. v. Westover*, *supra*.

The answer of respondents Conrail and Jordan denied petitioner's claims and further set forth an affirmative defense and a counterclaim alleging that petitioner had

altered its copy of the Agreement of Sale, that its President, Elmer Jonnet, assisted in the fraud, and that petitioner filed the action with full knowledge that it had no tenable antitrust or other claim to damages, or to the property in question.

Further, respondents' counterclaim specifically alleged malicious prosecution and requested money damages only (C.A.App. at 38, 40):

> 11. . . . Jonnet has filed this action with full knowledge that it has no tenable antitrust or other claim to the property in question, in bad faith, with malice, and knowing that it has no factual or legal basis therefor.
>
> 12. . . . Jonnet filed this action, not with the intention of vindicating any legal rights it might have, but rather, with the intention and purpose of misusing and abusing the process of this Court.
>
> • • • •
>
> WHEREFORE, Conrail and Jordan each demand judgment against Jonnet for compensatory damages in excess of $10,000.00 each, for an award of punitive damages and for their attorneys' fees and costs.

While fraud in the abstract states neither a legal nor an equitable cause, the pre-federal rules case law manifestly establishes that appellees' counterclaim is legal in nature:

> For the purpose of determining whether an issue of fraud should be tried to the court or to the jury the relief sought by the party raising the issue becomes important. Thus where the plaintiff seeks damages for the conversion of chattels as a result of defendant's fraud the claim is legal. Similarly a claim for damages predicated upon the fraud and deceit of the defendant is essentially an old common law action of trespass on the case. (Footnotes omitted).

5 Moore's Federal Practice ¶ 38.20 (2d Ed. 1980).

At common law, the counterclaim brought by respondents would fall within the legal action known as trespass on the case, embracing suits for damages based on fraud and deceit, or malicious prosecution. 5 Moore's Federal Practice ¶ 38.11[5] (2d Ed. 1980). As a legal action, in premerger practice, such claims afforded a party a right to a jury trial:

> The Seventh Amendment to the United States Constitution preserves the right to a jury trial in all suits at common law where the value in controversy exceeds twenty dollars. Rule 38 of the Federal Rules of Civil Procedure also preserves this right. An action for malicious prosecution falls well within the recognized forms of action at common law.

Smoot v. Fox, 353 F.2d 830, 833 (6th Cir. 1965), *cert. denied*, sub nom. *League of Women Voters v. Smoot*, 384 U.S. 909 (1966).

Besides the classification of both the fraud and malicious prosecution claims as legal under premerger procedure, the record indicates that the parties considered the counterclaim as one for damages. Immediately preceding the trial on the counterclaim, appellant made a motion to withdraw all equitable claims for relief.[8] Respondent Conrail expressed a desire that, if the trial court should grant petitioner's motion, the counterclaim should survive as a legal claim (C.A.App. at 117):

> THE COURT: Now so the record is clear, the plaintiff has filed a motion to withdraw its request for equitable relief as set forth in plaintiff's prayers for relief, and Counselor Silvestri has indicated that that would include a request for preliminary and permanent injunctive relief.
>
> MR. MANION [Counsel for respondents Conrail and Jordan]: Yes, and in addition to the matters which Your Honor feels still are not resolved by that, it seems to me—and I just want to make sure

[8] Granting such a motion was an obvious method of preserving petitioner's Seventh Amendment rights while relieving respondents of the burden of litigating the equitable claims.

> this is clear—so far as the defendant Conrail and Jordan and I believe all defendants are concerned, that it [the withdrawal of plaintiff's equitable claims] doesn't affect our right to claim damages for what we consider to have been a frivolous or bad faith action, and also that it does not waive or abandon our claim that a fraud has been perpetrated on the Court even in the action for money damages.
>
> THE COURT: It couldn't.

In light of the foregoing, it must be concluded that respondents' affirmative defense and counterclaim are legal in nature. Moreover, in *Ross v. Bernhard*, *supra*, and *Dairy Queen v. Wood*, *supra*, this Court found that since the claims of the litigants were for damages, the claims were legal in nature.

The instant case presented to the trial court a situation in which common issues of fact were essential to both the legal and equitable claims and defenses asserted. Respondents' affirmative defense of fraud and legal counterclaim of malicious prosecution were based on the allegation that petitioner fraudulently altered the sales agreement through which it claimed title to Penn Station—the property at the center of the dispute. Petitioner, on the other hand, asserted that it was the officials of respondent Conrail who possessed the motivation to alter the sales agreement as part of an overall plan to prevent sale of Penn Station to petitioner. Thus, the issue of fraudulent alteration was not only relevant to a determination of whether equitable relief was appropriate, but it was essential to respondents' legal counterclaim for damages and appellant's legal claim for violation of federal antitrust laws. Furthermore, the most obvious defense to the alteration allegation was the existence and scope of an agreement and conspiracy among respondents to deny the property to petitioner,[9]

---

[9] This defense was known to the trial court. In a deposition read to the court, John Jaeger, Director of Field Services for Conrail's Real Estate Department responded under oath:

[Footnote continued on page 20]

clearly an issue within the ambit of petitioner's legal cause of action. It was in recognition of these facts that trial counsel moved the court at the outset of the hearing to impanel a jury to determine the issue of alteration of the sales contract.

Indeed, although the trial court denied petitioner's motion to impanel a jury, it recognized the all-encompassing importance of the issues being tried (C.A. App. at 88):

> THE COURT: I would point out to the plaintiffs that I expect a motion to dismiss and claim for all equitable relief at the conclusion of the testimony on the fraud, on the theory that if the documents were altered, that the evidence is clear and convincing on the point, and, as result, the court should dismiss at the very least the claim for equitable relief because of that fraud on the court, and of course that type of conduct would be relevant as to whether or not we should go further with a request for preliminary relief, *and it may be relevant on the question of monetary damages also, if fraud has been established by clear and convincing evidence.* [Emphasis added].

---

[9] [Continued]

"Q Did you or anyone there tell him [*i.e.*, Elmer Jonnet] that this decision had been made in part due to political consideration?

"A Yes.

"Q Would you describe what was said as you best remember it?

"A The thrust of the conversation was that under the circumstances Conrail really didn't have any alternative but to go along with the City in the matter. Politics was clearly involved. Conrail is an organization that was dependent upon the Federal Government for necessary funding.

"Under those circumstances with the City indicating that it wanted the property for a major redevelopment project, it was very important to it; the fact that they were offering us more money; you put all of those things together and Conrail just could not refuse to go along."

Transcript of Hearing beginning June 8, 1981 at 514.

Applying the criteria of *Ross v. Bernhard, supra*, to the instant case, it must be concluded that the petitioner's antitrust claim for treble damages and respondents' defense and counterclaim for damages were legal in nature. Without a finding of fraudulent alteration of the sales agreement, respondents' legal claim had no basis. Moreover, the determination by the trial court may collaterally estop petitioner from attempting to prove that Conrail officials altered the document as part of the overall design to prevent the sale of Penn Station to appellant.

This Court has emphasized that "[t]he federal policy favoring jury trials is of historic and continuing strength," *Simler v. Conner*, 372 U.S. 221, 222 (1963), and that any seeming curtailment of the jury trial right should be scrutinized with the "utmost care." *Dimick v. Schiedt, supra.* When viewed against this background and the teachings of *Beacon Theatres, supra*, the unavoidable conclusion is that the trial court committed an abuse of discretion, and the court of appeals erred, in denying petitioner its right to a jury trial on all issues relevant to its antitrust claim and all issues common to both legal and equitable claims.

II. THE COURT OF APPEALS SANCTIONED A DEPARTURE BY THE TRIAL COURT SO CONTRARY TO THE ACCEPTED INTERPRETATION BY OTHER CIRCUITS OF THE SEVENTH AMENDMENT AND THE FEDERAL RULES OF CIVIL PROCEDURE AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO ASSURE UNIFORM INTERPRETATION OF THE RIGHT TO JURY TRIAL.

The decision of the court of appeals is in conflict with decisions in other circuits holding that where both injunctive and legal remedies are requested, the trial court must not adjudicate, in an equitable proceeding, issues common to the legal claims.

In the case of *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961), Chemi-

Cord filed a complaint to restrain Thermo-Stitch from interfering with its business relations and from harassing it by threats of suit. The complaint requested an injunction and a declaratory judgment. Thermo-Stitch asserted a counterclaim for damages for patent infringement, fraud and antitrust violations, and it demanded a jury trial on the issues the counterclaim raised. The trial court on the authority of Fed. R. Civ. P. 42(b) subsequently granted Chemi-Cord's motion for an immediate and separate trial on the issues of validity and infringement of the patent, and struck Thermo-Stitch's motion for a jury trial on those issues.

The Fifth Circuit initially addressed the difficulties trial courts experienced prior to this Court's decision in *Beacon Theatres*. It said, 294 F.2d at 488-89:

> The difficulty comes in deciding whether the legal or the equitable cause should be tried first—an issue of practical importance to litigants, since the determination of either cause acts as collateral estoppel on common questions of fact in the other. The broad grant of discretion under Rule 42 for a trial judge to order separate trials would seem to imply authority to decide the order of the separate trials, but courts struggled with this problem without clear guidelines.

In holding that the trial court erred in proceeding first with the equitable claim that contained issues common to Thermo-Stitch's legal counterclaim, the Fifth Circuit said, 294 F.2d at 490-91 (footnote omitted):

> Beacon Theatres holds that where the presence of legal and equitable causes in the same case requires the selection between a jury and a non-jury determination of certain common issues, the discretion of the trial court is "very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. Analogizing a motion for a non-jury trial of common issues to a suit for an injunction, the Court held that a showing of irreparable injury and inadequate relief at law is

required: "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims." 359 U.S. at pages 506-507. While the right to trial by jury is a constitutional one, no similar importance attaches to trial by court. Under the flexible procedures of the Federal Rules, a jury determines issues pertinent to an equitable cause without interruption or prejudice to the proceeding; the court decides whether equitable relief is called for on the basis of the jury's findings of fact. The mere presence of an equitable cause furnishes no justification for depriving a party to a legal action of his right to a jury trial. . . . As long as any legal cause is involved the jury rights it creates control.

Other circuits presented with the same issue have taken similar measures to insure that the litigant's right to a jury trial on common issues was not precluded by prior determination of equitable claims. In *Tights Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971), the Fourth Circuit faced a problem somewhat similar to that addressed by the Fifth Circuit in *Thermo-Stitch*. In a patent infringement action, the trial court struck the jury demand of Tights, Inc. on the issues of patent validity and patent infringement choosing instead to address those issues in the equitable proceeding for an injunction requested by the plaintiff against Tights, Inc. The Fourth Circuit issued a writ of mandamus in that case and ruled that the trial court erred in attempting through the equitable proceeding to address the issues common to the legal and equitable claims presented. See also *Davis v. Ampthill Rayon Workers, Inc.* 446 F.Supp. 681 (E.D. Va. 1978), *aff'd*, 594 F.2d 586 (4th Cir. 1979).

This same decision was reached by the Second Circuit in *Robine v. Ryan*, 310 F.2d 797 (2d Cir. 1962) (jury trial on legal claims must precede a trial of any equitable issues that remain) and the Tenth Circuit in *United States v. State of New Mexico*, 642 F.2d 397 (10th Cir. 1981) (trial court erred in conducting hearing on injunction—New Mexico was entitled to have jury decide "the pivotal issue of fact"). *See also Lucas v. Philco-Ford Corp.*, 380 F. Supp. 139 (E.D. Pa. 1974) (where plaintiff sought both monetary damages and injunctive relief he was entitled to a jury trial on his legal claims, including all issues common to both legal and equitable claims).

Moreover, some courts have seen fit to have the jury try both the legal and equitable claims. *See Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*, 581 F.2d 246 (10th Cir.), *cert. denied*, 440 U.S. 914 (1978) (claims for monetary damages and rescission of contract); *Prudential Insurance Co. v. Bonney*, 299 F. Supp. 794 (W.D. Okla. 1969) (mortgage foreclosure suit with counterclaims of slander of title).

This Court has often granted certiorari in cases where the courts of appeals have differed in their interpretation of federal statutes or rules. *See, e.g., United States v. Muniz*, 374 U.S. 150 (1963); *United States v. O'Malley*, 383 U.S. 627 (1966). The decision of the Third Circuit in the instant case constitutes so great a departure from the accepted practice followed by other circuits that the Court should exercise its authority and grant the petition for a writ of certiorari for the purpose of instructing the circuits on the interpretation of fundamental constitutional rights.

CONCLUSION

The decision of the court of appeals denying petitioner its Seventh Amendment right to a jury trial on legal issues and issues common to both the legal and equitable claims represents a departure from the decisions of this Court. It deprives petitioner of its constitutional right to a jury trial under the Seventh Amendment. In addition, the decision is contrary to the decisions of other circuits interpreting the Seventh Amendment in similar situations. This Court should grant certiorari to make it clear to the lower courts that the constitutional right to jury trial is so precious that it should not be taken away by specious claims of waiver or through legalistic grounds of collateral estoppel, based essentially on a trap, in the teeth of a reservation against such a result.

The petition for a writ of certiorari should be granted and the judgment below reversed with directions that the District Court grant a new trial to be held in compliance with the jury trial provisions of the Seventh Amendment.

Respectfully submitted,

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June, 1982.

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 81-421

JONNET DEVELOPMENT CORPORATION,
Plaintiff

vs.

RICHARD S. CALIGUIRI *et al.*,
Defendants

EXCERPT FROM PROCEEDINGS

Transcript of Findings of Fact and Conclusions of Law at Hearing on Motions for Preliminary and Permanent Injunctions on June 16, 1981, United States District Court, Pittsburgh, Pennsylvania, before Honorable Donald E. Ziegler, District Judge.

APPEARANCES:

On behalf of Plaintiff:

John M. Silvestri, Esquire

On behalf of Defendants Caliguiri, Matter, Brophy, DeLuca, Gaetano, Hayllar, Lurcott and City of Pittsburgh:

Dante Pellegrini, Assistant City Solicitor

On behalf of Defendants Charlton, The Buncher Company and Jack G. Buncher:

Mary Reitmeyer, Esquire

On behalf of Defendants George, Robin and Urban Redevelopment Authority of Pittsburgh:

Robert M. Brown, Esquire
Jo An Haller, Esquire

MARILYN G. BROWN
Official Reporter

On behalf of Defendant Milton:
Eugene Mikolajczyk, Esquire

On behalf of Defendants Consolidated Rail Corporation and Jordan:

Paul A. Manion, Esquire
Kevin P. Lucas, Esquire

On behalf of Defendant MONDEV International of Montreal:

Michael C. Hanzel, Esquire

• • • •

[2] (Proceedings resumed in open court at 9:05 a.m. on June 16, 1981.)

• • • •

THE COURT: All right, sir.

This is the case of Jonnet Development Corporation, Plaintiff, vs. Richard S. Caliguiri and others, Defendants, at Civil Action No. 81-421, and the following shall constitute findings of fact and conclusions of law:

1. This is a civil action for equitable relief and money damages, predicated on Section 4 of the Clayton Act, 15 USC Section 15, and Sections 1, 2, 4, 15, 22 and 26 of the Sherman Act. Jurisdiction is based on 28 USC Sections 1331 and 1337.

2. Section 1 of the Sherman Act, 15 USC Section 1, provides in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal: . . ."

Section 4 of the Clayton Act, 15 USC Section 15, provides in pertinent part, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover

threefold the damages by him [3] sustained, and the cost of suit, including a reasonable attorney's fee."

3. The phrase "antitrust laws" includes the Sherman and Clayton Acts. 15 USC Section 12(a).

4. Jonnet Development Corporation instituted this civil action on March 18, 1981, against 22 defendants, alleging a conspiracy to restrain construction of a hotel by plaintiff in the Pennsylvania Railroad Station Complex in Midtown Pittsburgh.

Plaintiff also instituted a number of state court actions in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking specific performance, a constructive trust, and money damages.

The federal and state court equitable claims constitute a cloud on the title and thereby are preventing various lenders from advancing funds to a second developer for renovation of the subject property. These equitable claims have also prevented Consolidated Rail Corporation from scheduling a closing date and transferring title to the Urban Redevelopment Authority of Pittsburgh.

5. This case also has broad public interest connotations. All parties admit that the building is historically significant because it is a landmark and, due to its state of disrepair, it is wasting due to weather conditions.

From a private point of view, the federal and state [4] court equitable claims of Jonnet Development Corporation have barred Conrail from scheduling a closing on the property, have prevented Conrail from conveying title to the property, have prevented Conrail from receiving $2.75 million in payment for the property, and also have interrupted startup work on the complex to prevent further destruction of the superstructure due to the weather elements.

6. In the complaint of the plaintiff, Jonnet Corporation seeks the following equitable relief at Paragraph 31:

"Voiding the Agreement of Sale between Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH;" and "Enjoining Defendant, CONRAIL, and Defendant, URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH, to convey the property of PENN STATION to Plaintiff."

The same requests for equitable relief are set forth in the WHEREFORE clause, namely, voiding the agreement of sale between Conrail and Urban Redevelopment Authority and enjoining the conveyance.

7. Despite the teachings of *Beacon Theatres, Inc., vs. Westover*, 359 U.S. 500 (1959), plaintiff filed a motion for a preliminary injunction on April 7, 1981, alleging that legal relief was inadequate due to the existence of irreparable harm.

Jonnet Corporation sought preliminary injunctive relief enjoining the defendants, Urban Redevelopment [5] Authority, Consolidated Rail Corporation, Buncher Company, MONDEV-Buncher Associates, and their agents, from (a) effectuating any agreements for transfer of Pennsylvania Station; (b) entering into any additional agreements for the alienation and transfer of the realty; (c) making any alterations or improvements to said property absent Court approval; and (d) preventing plaintiff or its representatives from entering the Penn Station property.

8. At plaintiff's urging, a hearing was set for the earliest possible date, namely, May 26, 1981, at 10:00 a.m.

The Court also ordered at plaintiff's request that all defendants appear at the hearing for cross examination by Jonnet's counsel, as well as Messrs. Huff, Jaeger, Williams and Schimmel, employees of Conrail, without the necessity of subpoena by plaintiff.

The affidavit of Elmer J. Jonnet, Jr., was filed with the motion for preliminary injunction, in which he at-

tested to personal knowledge of the averments of the motion, including the fact that, ". . . Plaintiff is entitled to receive title to said real estate, in that Plaintiff was the highest bidder . . ."

Finally, Jonnet requested and the Court ordered on April 7, 1981, as follows: "Plaintiff's discovery served upon Defendants ten (10) days prior to the date set for preliminary injunction hearing shall be completed and response and answers [6] thereto shall be served upon Plaintiff two (2) business days before preliminary injunction hearing."

9. Discovery had already commenced in the state court action in the case of plaintiff versis Consolidated Rail Corporation, GD No. 80-27589, and plaintiff continued its extensive efforts in this Court.

The various defendants in the instant case filed answers and motions to dismiss, which the Court denied without prejudice, pending the hearing on plaintiff's motion for preliminary injunction.

Jonnet filed motions to produce and interrogatories, to which, as ordered by the Court, the defendants were required to respond on or before May 21, 1981. The motions to produce and interrogatories of plaintiff were filed on April 7, 1981, and therefore the defendants were required to respond on or before May 21, 1981, two business days before the injunction hearing, the hearing being, of course, set for May 26, and the 25th of May was the celebration of Memorial Day.

10. On May 4, 1981, defendants, Consolidated Rail Corporation and Edward G. Jordan, filed a consolidated answer denying the averments of the complaint and, in a defense denominated as THIRTEENTH, averred as follows: "As more fully set forth in the counterclaim hereto, Jonnet's claims in this action are founded upon a forged document which [7] constitutes a fraud upon the Court."

Further, Conrail asserted in an affirmative defense that the Penn Station property had been let to bid on the following terms and conditions: "In the event either Conrail's Senior Management or Board of Directors fails to approve and authorize this transaction as aforesaid within ninety (90) days from the date of this agreement, or in the event the conveyance on the terms herein provided would be contrary to any law, regulation or order of governmental authority, then the sum paid on account will be refunded without interest to Purchaser who hereby agrees to accept same, whereupon this agreement shall be cancelled and annulled and neither party hereto shall have any claim whatever against the other by reason hereof."

Further, on page 7, the agreement provided: "Anything herein to the contrary notwithstanding, it is distinctly understood and agreed that this instrument does not constitute a binding agreement or impose any obligation on Conrail or its successors or assigns or its agents unless and until Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management and/or Board of Directors and that Conrail is [8] legally bound."

Thus, Conrail concluded that the alleged agreement of sale relied on by Jonnet to receive title to the property was a fraud, since it contained knowing and intentional alterations; and, further, that Conrail retained the exclusive right to reject any bid by Jonnet or anyone else and convey the property, as it planned to do, to Urban Redevelopment Authority of Pittsburgh for $2.75 million. Jonnet had offered $2.5 million in an offer dated July 1, 1980. Hence, Conrail contended that Jonnet's reliance on a forged document was a fraud on

the Court, since Jonnet knew of the forgery and filed suit in bad faith.

11. On May 11, 1981, defendants, Jack D. Buncher and The Buncher Company, filed a motion to advance and consolidate the trial on the merits with the motion of Jonnet for a preliminary injunction.

12. On May 20, 1981, Jonnet filed a motion to continue the hearing on the preliminary injunction. In its motion, Jonnet Development Corporation stated at Paragraph 9 as follows: "With reference to BUNCHER's Motion . . ., Plaintiff will consent to the same, provided that a new hearing date be set which would provide enough time to accomplish all depositions as aforementioned, together with the transcription of the same, together with time to inspect relevant documents and prepare for such a preliminary injunction hearing; it [9] being understood that the purpose of the hearing will only be to determine the appropriateness of injunction as a remedy, with Plaintiff reserving the right to proceed to jury trial on the ultimate issue of anti-trust law violations and damages."

13. On May 22nd, 1981, the Court granted the motion of Jonnet to continue the claim for equitable relief. The Court scheduled a hearing on plaintiff's request for equitable relief for June 8, 1981, at 10:00 a.m., at plaintiff's urging.

The Court established a discovery schedule at the status conference of May 22nd, 1981, which would enable Jonnet Corporation to go forward on its claim for equitable relief on June 8, 1981, and postpone until a later date the claim of Jonnet for damages under the Sherman and Clayton Acts before a jury.

Moreover, a review of the exhaustive discovery undertaken by Jonnet Corporation prior to the hearing of June 8 indicates that plaintiff was able and willing to proceed with its equitable claim for relief at that time.

14. On June 4, 1981, the Court conducted a second status conference at the request of the parties. The Court ordered that since plaintiff was seeking equitable relief prior to consideration by a jury of plaintiff's claim for antitrust damages, the Court should hear evidence at the hearing on June 8 concerning the defense of Conrail that [10] Jonnet Corporation had knowingly filed suit or was relying upon a forged document.

At page 3 of the transcript, the Court stated: "One of the issues in this case raised by the defendants as an affirmative defense is that there has been a fraud on the court in that certain documents were altered and certain perjurious testimony has been presented. The question of whether or not there has been a fraud on the court is important as to whether equitable relief would be granted, and therefore the court will hear on Monday, June 8, through Thursday, June 11, 1981, the testimony from all parties concerning the question of whether or not any documents have been altered."

The transcript at page 7 indicates that Jonnet Corporation agreed to this procedural device to determine plaintiff's right to equitable relief.

Further, it is obvious that since plaintiff was the party urging a trial on equitable relief prior to the antitrust claim for damages, and if Conrail established fraud by Jonnet Corporation by clear and convincing evidence, the equitable claims must be denied based on the equitable doctrine of unclean hands.

Thus the use of Rule 42(b) was clearly appropriate under the circumstances, bearing in mind that Jonnet Corporation would litigate its legal issues before a jury at a later [11] date, as urged by Jonnet from the outset.

15. The foregoing facts make clear that the case of *Beacon Theatres vs. Westover*, 359 U.S. 500 (1959), is inapposite.

Plaintiff was the party that moved this Court to treat the equitable claim prior to adjudication by a jury of the legal issues for declaratory judgment and money damages. Plaintiff moved on two occasions for an advanced equitable hearing, and the Court set two dates for such a hearing, that is, May 22nd and June 8th, 1981.

The use of Rule 42(b) with respect to plaintiff's claim for equitable relief was judicious, because if Conrail established the defense of unclean hands by clear and convincing evidence, plaintiff's claim for equitable relief must be denied.

The transcript of June 8 makes clear the basis for our ruling, and Jonnet's motion for mandamus in the Court of Appeals and recusal to this Court is specious and without merit.

The Court's ruling on June 8 concerning plaintiff's demand for a jury trial is also sound, since a bench trial is the proper means for adjudicating equitable claims which are pressed by a plaintiff at its specific request prior to consideration of the legal issues.

The transcript of the proceeding on June 8 at [12] pages 2 through 8 indicates that Jonnet Corporation will be accorded a trial by jury at a later date, if it desires, on its claims for declaratory relief and money damages.

16. Turning to the question of unclean hands as a basis for denying equitable relief, the Court properly imposed the burden of proof upon Consolidated Rail Corporation. Conrail must prove this defense by clear and convincing evidence. See *Monsanto Company vs. Rohm & Haas Company*, 456 F.2d 592, 598 through 599 (Third Circuit, 1972).

17. Issues of fact in civil cases are ordinarily determined in accordance with the preponderance of the

evidence test. Some state courts have consequently held that in seeking to prove fraud, a party need only produce a preponderance of the evidence. See 37 C.J.S., Fraud, Section 114 (1943 and 1980 Supplement).

However, that standard is not in accord with federal jurisprudence, where a more exacting standard has been applied. A party asserting fraud as the basis for a claim or defense must prove that a fraud was perpetrated by clear and convincing evidence. See *Monsanto Company vs. Rohm & Haas*, 456 F.2d at 601, and footnote 14 and the dissent of Judge Kalodner.

As was stated by the Court of Appeals for the Fifth Circuit in *Kinnear-Weed Corporation vs. Humble Oil & Refining*, 441 F.2d 631 (Fifth Circuit, 1971), "In testing [13] sufficiency of proof in federal courts, federal not state standards must be applied. . . . We hold that fraud proof must be built of sterner stuff. Clear and convincing evidence was what was required."

See, also, *In re Multidistrict Litigation Involving Frost Patent*, 540 F.2d 601, 603 (Third Circuit, 1976), where the Court of Appeals for this jurisdiction held that patent fraud must be proven clearly, unequivocally and convincingly.

We note that this same exacting standard obtains under Pennsylvania law. See, namely, *Highmont Music Company vs. J. M. Hoffman Company*, 397 Pa. 345, 155 A.2d 363 (1959). In *Highmont*, the Court held that fraud must be proven by evidence that is clear, precise and indubitable.

18. As Judge Aldisert stated in *Monsanto Company vs. Rohm & Haas* at page 598, "We perceive the test to be that set forth by the Supreme Court in *Precision*: 'The facts of a given case must accordingly be measured by both public and private standards of equity':

> "The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come

with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been [14] the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' . . . Thus while 'equity does not demand that its suitors shall have led blameless lives,' . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. . . .

"This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maximum by the chancellor."

19. In addition, in Volume 37 of Corpus Juris Secundum, Section 93, Equity, page 1006 (1965 and 1980 Supplement), it is stated as follows:

[15] "He who comes into equity must come with clean hands. The well-established principle expressed in this maximum is one of ancient origin and broad application. It is a cardinal maxim and the expression of the elementary and fundamental conception of equity jurisprudence. Although not the source of any distinctive doctrine, it furnishes a most important and universal

rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights.

"This maxim expresses rather a principle of inaction than one of action, and may be invoked only to prevent affirmative equitable relief. It means that equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief. Equity denies affirmative relief for such conduct no matter how improper may have been defendant's behavior or how serious are the charges of wrongdoing laid to defendant, and even though it thereby leaves undisturbed and in ostensible full legal effect acts or proceedings which would affirmatively be set aside but for such consideration.

"The maxim is based on conscience and good faith. It is not strictly or primarily a matter of defense. It has been held by the courts that the maxim is not applied to favor a defendant, and has nothing to do with the rights or [16] liabilities of the parties, but is invoked in the interest of the public on grounds of public policy and for the protection of the integrity of the court. According to some authorities the principle of withholding relief from complainant because of unclean hands is punitive in its nature, but others hold that the maxim is not invoked for purposes of retribution or punishment.

"Whether parties are within the application of the maxim is primarily a question of fact, and the court, on any suggestion that a plaintiff has not acted in good faith concerning matters on which he bases his suit, must inquire into the facts in that respect. There must be some evidence to justify the application of the doctrine by the court, and it should not be applied unless the person against whom it is sought to be applied was apprised of the claim of unclean hands and afforded an opportunity to present such evidence as might bear on that issue."

20. The first question we must determine is whether Consolidated Rail Corporation has presented clear and convincing evidence that the agreement dated July 1, 1980, was materially altered.

Conrail presented evidence which, if believed, would meet this test.

Messrs. Williams and Hindman testified that Exhibits 5A and 5B accurately reflect the terms and conditions [17] on which Elmer Jonnet as President of Jonnet Development Corporation submitted a bid to Conrail to purchase the subject property. According to them, the inserts on lines 1, 8, 9, 10, 16, 17, 18, 19, 20, 21 and 22 were made by either or both in longhand.

Further, the agreement contains seven pages, and page 6 included this final paragraph: "Anything to the contrary notwithstanding, it is distinctly understood and agreed that this instrument does not constitute a binding agreement or impose any obligation on Conrail or its successors or assigns or its agents unless and until Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management and/or Board of Directors and that Conrail is legally bound."

Thus, this evidence, if correct, would establish that Jonnet Development Corporation submitted a conditional bid in the sum of $2.5 million for the property, the conditions being (a) approval by Senior Management or the Board and (b) written notice to the Purchaser of the approval by Senior Management or the Board.

21. Messrs. Williams and Hindman appeared to this Court to be truthful and honest witnesses, and this Court finds as [18] a fact that Jonnet Development Corporation submitted a bid to Conrail on July 1, 1980, for

the Penn Station property which was subject to the approval and authorization of Conrail's Senior Management and/or Board of Directors.

Further, this Court finds as a fact that neither Senior Management nor the Board of Directors approved the offer to purchase the property by plaintiff for $2.5 million. Thus Conrail was never legally bound to convey title to the property to Jonnet Development Corporation, since its bid was never accepted, as required by the agreement.

22. Consoliated Rail Corporation has also proved much more.

Messrs. Williams and Hindman testified and we find as a fact that page 6 of the proposal submitted by Jonnet Development Corporation contained no markings or deletions on the final paragraph. Thus, not only was plaintiff's offer subject to Senior Management and/or Board approval, it was also subject to the requirement that before Conrail would be legally bound, the Assistant Vice President Real Estate or his authorized representative must give written notice to Jonnet of the required approval.

Further, we find that neither Conrail's Board nor its Senior Management ever accepted plaintiff's offer to purchase the property, and therefore plaintiff has no legal right to receive title to the property.

[19] 23. Conrail has also established that Exhibit 5C is a fraud. The evidence is clear, convincing, precise and indubitable that the exhibit contains material and intentional alterations.

First, page 6 contains a line through the final paragraph which was not part of plaintiff's offer on July 1, 1980. See Exhibits 5A and 5B for correct copies of plaintiff's offer to purchase.

Second, an extremely qualified expert has testified that pages 1 and 6 of Exhibit 5C are additions and were not part of Jonnet's offer on July [illegible] 1980. This evidence corroborates, of course, the testimony of Messrs. Williams and Hindman.

To support his conclusions, Mr. Walls provided a number of credible findings which we accept:

First, page 1 of Exhibit 5C is typed, and Exhibits 5A and B contain longhand printed inserts on lines 1, 8, 9, 10, 16, 17, 18, 19, 20, 21 and 22.

Second, Exhibit 5C contains typed inserts of the Prestige Elite Model 72 style, but Exhibits 5A and B are typed on IBM Standard.

Third, pages 1 and 6 of Exhibit 5C are thicker than pages 2, 3, 4, 5 and 7 of Exhibit 5C, as measured on a micrometer.

Fourth, pages 1 and 6 of the same exhibit, namely, [20] Exhibit 5C, were done by dry copy, but Exhibits 5A and B were done with a wet copy machine such as used by Conrail.

Fifth, pages 1 and 6 of Exhibit 5C are longer than the remaining pages.

Sixth, no visible handwriting impressions were found on pages 1 or 6 of Exhibit 5C, but such impressions appear on pages 2, 3, 4 and 5, and all six pages of Exhibits 5A and B.

Seventh, ultraviolet light testing showed Exhibits 5A and B and all pages of 5C except pages 1 and 6 to reflect the same light.

And eighth, the staples on Exhibits 5A and B contain inherent flaws, but the 5C staples were different.

Thus he opined and we find as a fact that Exhibit 5C contains material alterations designed to remove from the transaction the requirement of written notice to

Jonnet Development Corporation of Board or Management approval and further designed to create the impression that Conrail was legally bound to convey the property to Jonnet Development Corporation for $2.5 million, all of which is false.

As a result, we find that Conrail has established by clear and convincing evidence that plaintiff's proposal dated July 1, 1980, to Consolidated Rail Corporation to purchase the Penn Station property was materially altered [21] in that the correct proposal is evidenced by Exhibits 5A and B and an intentionally and materially altered version is evidenced by Exhibit 5C.

24. The next question we must address is whether Conrail has established by clear and convincing evidence that the material alterations were done intentionally by plaintiff.

It should be remembered that plaintiff was represented at all times during the offers of January 8 and July 1, 1980, by its president, Elmer Jonnet.

Further, the evidence is clear and convincing and this Court finds that the agreement of January 8 was the form used to create Exhibit 5C. The type styles of the bodies are the same and were prepared by Conrail. The same carbon impressions on the Jonnet January agreement appear on Exhibit 5C. Also, both exhibits bear the same square marks and two unusual lines which appear on pages 1 of each. Finally, the inserts on both the Jonnet January exhibit and Exhibit 5C bear identical carbon impressions.

Finally, the only person and entity who could benefit by the enforceability of Exhibit 5C is plaintiff and its president, Elmer Jonnet.

Thus we find by clear and convincing evidence that Exhibit 5C is a fraud, it does not represent plaintiff's true bid on July 1, 1980, it is material to this claim,

and that the fraud was intentionally perpetrated by plaintiff and its [22] president, Elmer Jonnet, who signed all documents including Exhibit 5C.

25. There is other evidence of a clear, convincing character which requires this Court to deny equitable relief sought by plaintiff in this case.

Although plaintiff has asserted that it is entitled to title to Penn Station by virtue of Exhibit 5C and that a final and binding agreement was executed on July 1, 1980, Mr. James J. Kelly testified that Elmer Jonnet contacted him subsequent to August 31, 1980, to enlist Kelly's aid in obtaining Management approval of plaintiff's offer.

Elmer Jonnet denied on three occasions under oath in this case to those entreatments.

James J. Kelly was a candid, forthright and truthful witness. He testified credibly, and his recollection was related to a specific instance in Midway, Pennsylvania.

We find that Conrail has established by clear and convincing evidence that Elmer Jonnet has testified falsely in this case with respect to the binding effect of his offer of July 1, 1980.

26. As Judge Aldisert has noted, "He who comes into equity must come with clean hands."

The doors of equity are closed to plaintiff, because the evidence is clear and convincing that plaintiff has attempted to perpetrate an egregious fraud upon Conrail [23] and others.

Moreover, plaintiff's equitable claims involve also the public interest. A historical landmark stands wasting because plaintiff has sought the aid of equity to impede the restoration of this venerable structure. The public and this community have suffered not only a delay, but perhaps an irreparable loss.

This Court will deny all equitable relief as sought by plaintiff in its complaint and the motion for injunctive relief to prevent a wrongdoer from enjoying the fruits of its and his transgression, but also to avert an injury to the public.

27. Because we have based our denial of equitable relief due to plaintiff's fraud on the parties, we need not reach the question of whether plaintiff's conduct constituted a fraud on the Court.

For a general discussion of that concept, see *Hazel Atlas Glass Company vs. Hartford Empire Company*, 322 U.S. 238 (1944), and 19 ALR Fed. 762.

28. The evidence of fraud upon the parties, as we have found, is clear and convincing. Reasonable minds could not disagree.

Although, as we have noted, Conrail has sustained its burden of proof, the record should also reflect that plaintiff presented no contradictory evidence.

[24] Indeed, an expert retained by Jonnet Development Corporation remained in court during the trial of this issue and conferred with Conrail's expert concerning the methodology of testing, and also conducted tests on her own. She was also given additional time by the Court to submit an opinion to plaintiff and testify, if it desired. In the end, plaintiff determined not to call Mary Metzler as a witness.

For the foregoing reasons, particularly that defendants have established by clear and convincing evidence that plaintiff attempted a fraud on the parties, the claim of plaintiff for equitable relief, including plaintiff's motion for preliminary and permanent injunctive relief, will be denied due to the doctrine of unclean hands.

29. To date, this Court has dealt only with the claim of plaintiff for expedited equitable injunctive relief. Since plaintiff has requested a subsequent jury trial on its

antitrust claim for damages, wherein plaintiff claims that it was the victim of an illegal conspiracy to deny it the right to construct a hotel at Penn Station, the Clerk will deliver to all counsel a Rule 5-II order with respect to pretrial discovery on the legal issues, and a jury trial will be conducted, if plaintiff desires, at a later date under the Sherman and Clayton Acts.

30. Finally, because this record contains serious allegations and evidence of criminal conduct, we will order [25] a copy of this transcript and all pleadings and papers to be forwarded to Robert Cindrich, United States Attorney for the Western District of Pennsylvania, for appropriate consideration.

A written order will follow.

Gentlemen, have I overlooked any issue?

MR. MANION: I would just like to make one comment on the jury trial issue, Your Honor.

I think that you have accurately summarized what occurred, but it occurred to me last night and again this morning that this issue is a feigned red herring, because, in light of the standard that we are held to to establish fraud, had the case been tried to a jury, the evidence as you have described it is so overwhelming that it would have required a directed verdict, that is, that no reasonable minds can disagree.

THE COURT: You are not without relief. A motion for summary judgment is appropriate.

Mr. Silvestri may decide not to proceed with the antitrust damages. A number of issues may arise along the road.

I specifically found that this was fraud on the parties. I did not reach the question of whether or not it was fraud on the Court.

MR. MANION: I appreciate Your Honor's comment [26] about future proceedings. I meant even as it applied to this proceeding. That contention, that it was strictly a—in light of the standard that we are held to, is strictly academic.

THE COURT: You may be right, but you can file the appropriate motions to address the Sherman and Clayton Act alleged violations.

Anything else?

Thank you very much.

(Proceedings adjourned at 10:30 a.m.)

Certified a true and correct transcript of Findings of Fact and Conclusions of Law at proceedings on June 16, 1981, before Honorable Donald E. Ziegler, District Judge.

/s/ Marilyn G. Brown
MARILYN G. BROWN
Official Reporter

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION
Appellant

vs.

RICHARD S. CALIGUIRI; DAVID MATTER; PAUL BROPHY; GEORGE CHARLTON; ED DELUCA; LOUIS GAETANO; STEVE GEORGE; TED HARDY; BEN HAYLLAR; ROBERT LURCOTT; HIRAM MILTON; JOHN ROBIN; CITY OF PITTSBURGH; URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH; CONSOLIDATED RAIL CORPORATION, a/k/a CONRAIL; EDWARD G. JORDAN; GRANT-LIBERTY DEVELOPMENT GROUP, a/k/a HILTON INTERNATIONAL; VISTA INTERNATIONAL; THE BUNCHER COMPANY; JACK G. BUNCHER; MONDEV-BUNCHER STATION ASSOCIATION; and MONDEV INTERNATIONAL OF MONTREAL

Appeal From the United States District Court
For the Western District of Pennsylvania

(D.C. Civil Action No. 81-0421)

Argued January 11, 1982

Before HUNTER, HIGGINBOTHAM, *Circuit Judges* and ACKERMAN,* *District Judge*

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* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

Date Feb. 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2182

JONNET DEVELOPMENT CORPORATION,
Petitioner

v.

RICHARD S. CALIGUIRI, *et al.*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Jonnet Development Corporation in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
JAMES HUNTER, III
Judge

Dated: March 15, 1982